United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

215

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,660

UNITED STATES OF AMERICA — Appellee

v.

SHARON Y. WILLIAMSON — Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED

1. Whether probable cause to arrest exists when a police officer observes a woman clad in her nightgown, in her own apartment, holding a prescription type bottle of white pills, when his only other information is that she has a previous arrest for a narcotics offense.

2. Whether a search warrant is validly issued when the affidavit on which it is based is impeached by another affidavit presented to the judicial officer at the same time to the extent that both affidavits cannot be true.

3. Whether information gained in an illegal search may form any part of the chain of probable cause for a later arrest, search and seizure.

4. Whether the activities of the police in appellant's apartment amounted to a search requiring consent beyond permission to enter and which, in the absence of such consent, was illegal.

5. Whether the ruling of the Court below that Officer Taylor saw a glassine bag in appellant's possession is clearly erroneous.

6. Whether the indictment which failed to charge that defendant was not an addict or, if an addict,

that she trafficked in narcotics set forth an offense over which the Court had jurisdiction.

7. Whether the Court below erred in denying appellant's Motion to Vacate Finding of Guilt and Dismiss the Indictment without holding a hearing to determine if appellant was a non-trafficking addict at the time of the offense.

STATEMENT OF WHETHER THIS CASE HAS PREVIOUSLY BEEN BEFORE THIS COURT

This case was before this Court under the same name and number on a Motion to Extend Time in which to File Brief and on a Motion to Appoint Co-Counsel. It has not been before this Court on any other question.

REFERENCES AND RULINGS

There are no written opinions, memoranda, findings or conclusions by the Court below. Three rulings are material for this appeal. The first is the oral denial on May 19, 1970, of appellant's Motion to Suppress Evidence, based on oral findings and conclusions found at pages 72 and 73 of the Official Transcript of Hearing and Trial. The second is the oral denial on May 19, 1970, of appellant's Motion to Set Aside Mandatory Sentencing Provisions found at page 73 of the Official Transcript of Hearing and Trial. The third is the denial without a hearing on August 19, 1970, of appellant's Motion to Vacate Finding of Guilt and to Dismiss Indictment, the reasons for which were stated at the time of sentencing and appear on pages 3 and 7 of the Sentencing Transcript.

TABLE OF AUTHORITIES

STATUTES

26 U.S.C. 4704(a)
Harrison Narcotic Act

Rule 12(b)(2), Fed. R. Crim. P.

Rule 41, Fed. R. Crim. P.

TREATISES

3 C.A. Wright, Federal Practice and Procedure, Criminal (1969)

STATEMENT OF THE CASE

Appellant was arrested on March 30, 1969, for the possession of 17 capsules of heroin. Subsequently she was indicted for a violation of 26 U.S.C. 4704(a) (Possession of Narcotic Drugs) and for a violation of 21 U.S.C. 174, (Receipt and Concealment of Narcotic Drugs, Knowing Same to Have Been Imported Contrary to Law).

Appellant then filed a Motion to Suppress Evidence on March 23, 1970, and a Motion to Set Aside Mandatory Sentence Provisions on May 8, 1970. On May 5, 1970, a hearing was held to take the testimony of Antoinette Harris for the Motion to Suppress. On May 19, 1970, the Court held a full hearing on the Motion to Suppress and denied it. On the same day, the Court denied the Motion to Set Aside Mandatory Sentence Provisions.

Appellant then waived her right to a jury trial, and the parties stipulated that the facts adduced at the hearing would be the same as those in a court trial. The Court on the stipulated facts found appellant guilty of the First Count in the Indictment,which charged a violation of 26 U.S.C. 4704(a). No finding was made on the Second Count of the Indictment,which charged a violation of 21 U.S.C. 174.

On August 17, 1970, appellant filed a Motion to Vacate Finding of Guilt and to Dismiss Indictment. This motion was

denied without a hearing on August 19, 1970.

On August 26, 1970, appellant was sentenced to a term of two to six years by the Court. At that time, appellant requested a hearing to determine if she was a narcotic addict at the time of the offense. The Court denied that motion. Appellant was continued on personal bond pending appeal.

STATEMENT OF THE FACTS

On March 17, 1969, Officer Marcellous Taylor, seeking two search warrants and two arrest warrants, presented Judge William C. Pryor of the then District of Columbia Court of General Sessions with two affidavits signed by himself. 1/ (M-II) 2/ According to Officer Taylor, one of the affidavits had been prepared by himself and the other by his secretary. (M-II 13) He did not read the second affidavit before submitting it to Judge Pryor. (M-II 14) Judge Pryor issued four warrants on the basis of the affidavits: a search warrant for the premises at 1423 Harvard Street, N.W., apartment 201, an arrest warrant for Clarence Harris, a search warrant for the premises at 1423 Harvard Street, N.W., apartment 208, and an arrest warrant for Charles Harris. (M-II 10, 11)

Except for minor variations, the affidavits are indistinguishable. In identical language, each states that an unidentified source informed Officer James Johnson that "it had been buying heroin from a man", known as Charles

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1/ The affidavits are attached hereto as an appendix. Hereafter they will be referred to as DX 1 and DX 2. DX 1 relates to apartment 208. DX 2 relates to apartment 201.

2/ Three transcripts will be referred to herein. The transcript of Hearing on May 5, 1970, will be denominated M-I. That of Motions Hearing on May 19, 1970, will be denominated M-II, and that of Sentencing on August 26, 1970, as S.

in apartment 208 and Clarence in 201, for about one week, the last time on March 16, 1969. Each then describes an agreement to purchase, the advancement of MPDC funds, the transportation to and from the premises by officers who searched before and after the purchase, and the source's observations while inside. Each affidavit states that the source heard "one subject yell, hurrah and come out of the bathroom so I can take-off". In addition, each states that the apartment is listed to "Sherrin Williams (sic) and that Clarence Williams is the "brother of the above mentioned subject."

Officer Taylor said at the hearing on the Motion to Suppress that it was an error to state that apartment 201 was listed to Sharon Williamson. (M-II 19) He also stated that apartment 201 is an efficiency and that it would be impossible for the seller to walk into the bedroom and get narcotics as the affidavit relating to that apartment (DX 2) had stated. (M-II 19, 20)

Officer Taylor executed three of the four warrants thus obtained on March 18. At that time he searched apartment 208, appellant's apartment, found narcotics and placed her under arrest. (M-II 14, 21) He also searched apartment 201 and served the arrest warrant on Clarence Harris. (M-II 14)

Appellant was never indicted on the charges stemming from the March 18 arrest. Officer Taylor arrested her again

on March 30, however, and the present charges are based on the events of that morning.

On March 30, Officer Taylor received information that Charles Harris, the subject of the unserved warrant, would be found in apartment 201. (M-II 15) Officer Taylor went with a raiding party to that apartment, knocked the door down and made a number of arrests. (M-II 15, 16) They discovered a quantity of narcotic paraphernalia but not narcotics. (M-II 28, 29).

The occupants of apartment 201 fled in numerous directions. At least one, Harold Ligon, escaped out the window, went across the fire escape and crashed through the closed window of appellant's apartment (apartment 208). (M-II 44, 45, 47) Several officers followed Ligon through the window and a number of others began to gather in appellant's apartment with prisoners apprehended elsewhere in the building and on the roof. (M-I 4, M-II 45, 48, 49, 50)

Officer Taylor, who had remained in apartment 201, received word that someone had jumped into apartment 208, and he decided to go there himself and "see what happened." (M-II 19, 37) He stated that he knew appellant lived in apartment 208 (M-II 16), and he had instructed members of his party to watch her apartment as well as 201. (M-II24)

When he got to appellant's apartment he knocked on the door and she admitted him. (M-II 38, 48, 50) He walked

over to the other officers then present, held a short discussion with them, then returned to appellant. (M-II 49) She was then clad in her nightgown, but she had a pair of pants over her shoulder which she intended to put on. (M-II 49) Officer Taylor questioned her about the pants, then took them from her and searched them. (M-I 3, M-II 49) He removed some money from the pockets, replaced it, and handed the pants back. (M-II 49)

Having returned the pants, Officer Taylor then focused his attention on the contents of her closed hand. He stated that he could see the bottom of a prescription type of vial or bottle containing some white capsules. He did not know what they were at that time (M-II 35), but he demanded to see what she was holding. (M-I 3, M-II 17, 34, 49) When she refused to reveal it, he threatened to call a policewoman to search her. (M-I 3, M-II 49) She surrendered the bottle and was placed under arrest. (M-II 49) A field test revealed the capsules to contain narcotics. (M-II 18)

Appellant stated that she had been in her bathroom when she was aroused by Ligon's forceful and noisy entrance into her apartment. Clad in her nightgown, she entered her living room to find Ligon attempting to hide and small bottles on the floor. (M-II 48, 49) Before she could dispose of them, police officers entered through the broken window. (M-II 48) When Officer Taylor knocked on the door she let him in,

stating that Ligon had jumped through her window. (M-II 38, 48, 50) She wanted the police there to remove him. (M-II 55) She did not consent to a search of her apartment, her possessions, or her person. The Court found her testimony credible. (M-II 73)

ARGUMENT

I. SEIZURE OF THE BOTTLE AND ITS CONTENTS WAS UNLAWFUL BECAUSE OFFICER TAYLOR DID NOT HAVE PROBABLE CAUSE TO ARREST APPELLANT

SUMMARY

Officer Taylor did not have a warrant for the search of Apartment 208 or the person of the appellant. When the seizure was challenged, therefore, the government bore the burden of establishing probable cause. U.S. v. Jeffers, 342 U.S. 48, 51 (1951); Wrightson v. U.S., 95 U.S. App. D.C. 390, 222 F.2d 556 (1955).

The government contended and the Court below found that Officer Taylor's observation of the vial containing white capsules in appellant's hand gave him probable cause to arrest her and seize the vial and its contents from her (M-II 68-73). The Court in effect determined that no violation of her privacy occurred because Officer Taylor was lawfully in her apartment and that he only observed that which would have been obvious to any person present there. The Court's ruling was erroneous because the officer was not in possession of sufficient information to justify a reasonable belief that the prescription vial contained narcotics.

Appellant urges that, taking together all the information in his possession and his observations at the scene, it was impossible for Officer Taylor reasonably to conclude that appellant's closed hand held illicit narcotics. But, if the Court should find that probable cause arose from those facts and circumstances, then appellant insists that the substantial part of the information essential to the conclusion was obtained during an illegal search of appellant's apartment on March 18, 1969, and, therefore, could not be relied on.

A. Officer Taylor's Information And Observations Provided An Insufficient Basis Upon Which To Conclude That Appellant Was Committing A Crime

The record contains no direct evidence on the basis for Officer Taylor's conclusion that the capsules were "some type of illicit narcotic drug." (M-II 35). He was asked to base his opinion only on his experience as a vice officer in investigating narcotic cases. (M-II 35) It is therefore necessary to examine the record to determine what facts he possessed which would justify more than suspicion or hunch that appellant had committed or was in the process of committing a crime. Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948).

It is uncontradicted that appellant met Officer Taylor at the door in her nightgown. She stated that she had been in the bathroom when she was aroused by the sound of her window being broken. (M-II 47,49) He could therefore observe nothing more than a woman in her nightgown with a prescription type bottle of pills in her hand. The officer observed no evidence of the presence of illegal narcotic drugs elsewhere in the room, nor did a subsequent search reveal any. What he observed, therefore, was conduct entirely innocent on its face. Cf. Henry v. United States, supra, 103-104.

Appearance of a woman in her nightgown with a bottle of pills in her hand cannot, without more, justify a man of reasonable caution in the belief that she is committing a crime. She was not holding the typical tin foil package, glassine bag[3/], or brown envelope used to package narcotics. Officer Taylor admitted that he did not know what the capsules in the vial contained. (M-II 35).

3/ The Court below in its finding characterized the vial as a "glassine bag," (M-II 72), although none of the government witnesses mentioned a container other than the prescription type vial. That finding is the subject of Part III of the Argument.

Indeed, Officer Taylor could not know that the bottle contained narcotics. He did not have sufficient information upon which he, "as a reasonable, cautious and prudent police officer," could reasonably reach that conclusion. Bailey v. United States, 128 U.S. App. D.C. 354, 357, 358, 389 F.2d 305, 309 (1968), citing Brinegar v. United States, 338 U.S. 160, 175 (1949); Draper v. United States, 358 U.S. 307, 311-312; Bell v. United States, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86 (1958); Carroll v. United States, 267 U.S. 132, 162 (1925). It was the government's burden to establish that information. Rouse v. United States, 123 U.S. App. D.C. 348, 350, 359 F.2d 1014, 1016 (1966); 3 C.A. Wright, Federal Practice and Procedure, Criminal, Sec. 675, p. 127 (1969), but the record will not support the conclusion that the government met their burden.

On the night in question, the only connection Officer Taylor could make between apartment 201 and appellant's apartment was their location in the same building. The fact that he observed narcotic paraphernalia in apartment 201 does not justify a conclusion that the residents of 208 were somehow involved in illegal activities. Nor were any of the guests in 201 admitted to 208 or given protection there. Harold Ligon broke into appellant's apartment through the window and she in fact refused to hide him.

Officer Taylor had arrested appellant on March 18, 1969, when he executed a search warrant for her apartment and found narcotics there.[4/] He also had information from an informant that narcotics had been sold in her apartment on some previous occasions. (DX 1), but he had no information that appellant had been involved with those sales or indeed had been present when they took place.

That a person associates with narcotic addicts or may be known to use narcotics himself does not justify an arrest and subsequent search. Sibron v. New York, 392 U.S. 40 (1968); Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961). Nor does presence in an apartment in which narcotics have been sold and in which narcotics are found create probable cause for arrest. In Whitley v. United States, 99 U.S. App. D.C. 159, 137 F.2d 787 (1956). The Court held that information from an informant that "a particular person" had sold narcotics in a particular room did not justify arrest of the occupant, found in the bathroom, notwithstanding use of narcotics in

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4/ That the information gained by Officer Taylor at and during execution of the warrant on March 18, may not justify the arrest in this case is the subject of the succeeding section of this brief.

the adjoining bedroom. See also Johnson v. United States, supra.

Thus, although the officer was entitled to draw some inferences from his own information, primary support for his conclusion must come from observations at the scene. His observation of a vessel which is capable of containing narcotics is not persuasive that its possessor is committing a crime. Like the cartons loaded into the car in Henry v. United States, supra, the bottle of pills supported no inference of criminality until it was opened.

In Hobson v. United States, 226 F.2d 890 (8th Cir. 1955), officers went to the defendant's home to arrest his wife Regina for violation of the narcotic laws. They had no warrant for arrest or search. Upon their arrival and knock at the door, defendant appeared but retreated. His wife then appeared and asked for time to get some clothes on, whereupon an officer in the rear of the house observed the defendant throw a package from the back window to the enclosed backyard. The officers broke into the house and arrested the defendant. The Court of Appeals held that defendant's motion to suppress should have been granted. It said that throwing a package out the window into one's own yard did not create probable cause for arrest. Unless the officers

looked into the package and determined its contents, they were without reasonable grounds to conclude that the defendant had committed a crime.

In California v. Hurst, 325 F.2d 891 (9th Cir. 1963), police had received an anonymous tip that two pounds of marijuana were secreted under defendant's house. They went to the premises without a warrant, found a large brown bag in a vent hole in the side of the house, which, after extracting it and examining its contents, they found to contain marijuana and heroin. In affirming the District Court's order suppressing the evidence, the Court rejected the contention that the drugs were in plain view. It was not until the package was removed and the contents examined that the officers had probable cause to believe the defendants were in violation of the narcotic laws.[5/]

Thus, mere possession, actual or constructive, of a vessel which could contain narcotic drugs, even coupled with facts suggesting use or association with users, cannot justify an arrest and seizure. Narcotics

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5/ The Court held further that even if the bag was in plain view, the officer was illegally in the position from which he saw it. California v. Hurst, 325 F.2d 891, 899 (9th Cir. 1963)

addicts and their associates have medicinal needs like other persons. It is the unfortunate nature of narcotics that they are detectable in capsule form only by chemical analysis. But just as taxpayers may not be arrested while their returns are audited, possessors of prescription bottles of white capsules may not without more be deprived of their liberty while their nostrums are investigated.

Nor does the refusal to lay open that which one has chosen to keep from public view[6/] justify its seizure. The right to exercise Fourth Amendment protections would become meaningless if refusal to waive them could justify their violation. Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958). If Officer Taylor did not know before he asked to see the contents of the defendant's hand that she had narcotics, he had no right to demand them. The government presented nothing

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6/ In Katz v. United States, 389 U.S. 347, 351-52 (1967), the Supreme Court discussed the right of persons to choose what they will disclose to the public:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

to connect the defendant with the activities in apartment 201 on the morning of March 30. None of the officers saw her anywhere other than in her own apartment, and then not until they pursued a clearly unwanted intruder through her window. Their observations are more consistent with noninvolvement than with participation in a criminal enterprise, and it is submitted that they will not support any reasonable conclusion that appellant was engaged in crime.

B. Officer Taylor Could Not Rely On Observations Made Or Information Gained At Execution Of The Search Warrant Upon Apartment 208 on March 18, Because The Warrant Was Invalid And His Presence Illegal

Part A of Argument I asserts that all the information and observations of Officer Taylor did not justify his conclusion that appellant was committing a crime. Part B does not concede the principles advanced earlier. It urges, however, that, should the Court find that probable cause arose from the facts and circumstances discussed, it must find that the substantial part of Officer Taylor's information about appellant was obtained during his illegal search of her house on March 18, that such information cannot be used to justify an arrest and seizure, and that without it, no probable

cause existed.

Observations made by police officers when their presence is unlawful cannot constitute links in the chain of facts and circumstances furnishing probable cause. McDonald v. United States, 335 U.S. 451 (1949); Whitley v. United States, 99 U.S. App. D.C. 159, 237 F.2d 787 (1956); Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968); California v. Hurst,supra; Polk v. United States, 291 F.2d 230 (9th Cir. 1961); Hobson v. United States, supra; Brock v. United States, 223 F.2d 681 (5th Cir. 1955); Brown v. Patterson,275 F. Supp. 629 (D. Colo. 1967). If, therefore, Officer Taylor's information that defendant used narcotics or was in possession of them illegally and that she had been arrested for violation of the narcotic laws was gained by his presence in her apartment under an invalid search warrant, that information may not be relied on to supply probable cause for her arrest on March 30.

It was admitted at the hearing on defendant's motion to suppress that two substantially identical affidavits were presented to Judge Pryor on March 17. (M-II 13, DX 1,2) A comparison of the two affidavits indicates that the events described in each could not have taken place. One of the affidavits was obviously false. Although Officer Taylor explains that the

defective affidavit relates to apartment 201, it is impossible to tell from the face which one is defective. Read together, the affidavits impeach each other, and warrants could be issued upon them only through failure to exercise the most minimal scrutiny of their contents. A search authorized by such warrants is perforce unreasonable and illegal.

Judicial determinations of probable cause are not lightly disturbed by reviewing courts, but those courts must still "insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, 378 U.S. 108, 111 (1964).

Exercise of that neutral and detached function requires not only a certain quantity of facts about an informant and his information, Spinelli v. United States, 393 U.S. 410 (1969), but it must also require consideration of evidence impeaching the affidavits when such evidence is impossible to disregard. In Clay v. United States, 246 F.2d 293, 302, cert. denied 355 U.S. 863 (5th Cir. 1957), the Court said:

> ... in each case the inquiry is, are the facts put forward to support the action impeached in any way and, if not, are they as a whole sufficient to support the view that the conclusion reached and the action taken in accordance with the rule were not unreasonable but reasonable.

This judicial officer had evidence before him which called into question the veracity of both affidavits. His issuance of the warrants was a violation of his duty to consider the facts and inferences therefrom in a neutral and dispassionate manner before authorizing an invasion of appellant's privacy. His failure to exercise his function violated appellant's right to the protection a judicial officer provides between the citizen and the police officer "engaged in the often competitive enterprise of ferreting out crime." Aguilar v. Texas, supra, 115; Giordenello v. United States, 357 U.S. 480, 486 (1958); Johnson v. United States, supra, at 14.

Appellant is not calling upon the courts to go behind a single affidavit to the veracity of the affied information.[7/] Her attack is on the finding of probable cause itself. With the two affidavits before him,

7/ See King v. United States, 282 F.2d 398 (4th Cir. 1960); Lerner v. United States, 151 A.2d. 184 (D.C. Mun. App. 1959); United States v. Gillette, 383 F.2d 849 (2d Cir. 1967); but see Kenney v. United States, 81 U.S. App. D.C. 259, 157 F.2d 442 (1946).

Judge Pryor could only issue the warrants by failing to exercise the responsibilities placed on him by the Constitution and by Rule 41 of the Federal Rules of Criminal Procedure.[8/] The warrants were therefore invalid and the search unlawful.

It was the search of appellant's apartment on March 18, which provided Officer Taylor with the information that appellant had been arrested on narcotics charges and that she might be involved with whatever illicit activities were taking place in her apartment. (M-II 21) That search apparently also provided Officer Taylor with appellant's identity and residence. (M-II 16). None of this information can form any part of the chain of facts in a determination of probable cause of March 30. It was illegally obtained and the fruits which ripened from it grew on a poisonous tree. Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920); California v. Hurst, supra, at 897.

8/ Although it is said that the finding of probable cause is conclusive unless arbitrary, Gracie v. United States, 15 F.2d 644, cert. denied 273 U.S. 748 (1st Cir. 1926), arbitrariness cannot be limited to the irrational exercise of the magistrate's function. Its non-exercise is also arbitrary. Judge Pryor was under a duty at least to question the affiant "to satisfy himself that the constitutional standard had been met." Halsey v. United States, 257 F. Supp. 1002, 1006 (S.D.N.Y. 1966)

II. SEIZURE OF THE BOTTLE WAS UNLAWFUL BECAUSE APPELLANT HAD NOT CONSENTED TO ANY POLICE ACTIVITIES BEYOND REMOVING AN INTRUDER

Appellant concedes that she invited Officer Taylor into her apartment. (M-II 48) She wanted him to come in and take Harold Ligon out. (M-II 55) Other officers had followed Ligon through the window and they had been in appellant's apartment a considerable period before Officer Taylor came in. (M-II 50) While he was there and before making any effort to remove Ligon, Officer Taylor proceeded to search appellant's pants and then, noting appellant's closed hand, demanded to see its contents. (M-II 49) The Court found, based on appellant's testimony, that Officer Taylor was lawfully present. (M-II 73)

Officer Taylor's activities exceeded the scope of the consent given by appellant for his presence in her apartment. The fact that the occupant of premises gives an officer permission to enter does not permit him to conduct a search. Gouled v. United States, 255 U.S. 298 (1921); Williams v. United States, 105 U.S. App. D.C. 41, 263 F.2d 487 (1959). If he expands his activities beyond those expressly consented to, his presence becomes illegal. He may not take advantage of the invitation to satisfy his curiousity about the belongings of his host. 3 Wright, Federal Practice and Procedure, supra, Sec. 669, p. 83; Williams v. United States, supra.

When Officer Taylor began to search appellant's pants, he was no longer an invited guest, but a government agent engaged in "the competitive enterprise of ferreting out crime." He was then intruding on areas she had not consented to reveal. In the absence of "clear and positive testimony that appellant consented to his activities, he was required to get a warrant. Judd v. United States, 89 U.S. App. D.C. 64, 66, 190 F.2d 649, 651 (1951).

III. THE COURT'S FINDING OF FACT IS CLEARLY ERRONEOUS AND SHOULD BE REVERSED

The Court's conclusion that probable cause was present to justify the arrest and seizure was based on an erroneous view of the facts presented. Although appellant contends that under no version of the facts was the seizure proper, it submits that the Court's finding is so unwarranted by any of the evidence that reversal is required regardless of determination of the legal issue.

Ordinarily the factual determinations of the trial judge will be accepted on appeal unless they are clearly erroneous. Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965). Nevertheless, it remains the responsibility of appellate courts "to review fact findings and to reject them when we are firmly convinced they are wrong, when the probability of error is too great to tolerate." Id. at 327.

The Court below found that "Officer Taylor had the right to be on the premises and while he was there he saw the glassine bag that contained the capsules and that is the basis for the present charge. (Emphasis added) (M-II 72) None of the witnesses for the government or for the defense referred to a glassine bag. The vessel containing the capsules was a prescription type plastic vial. (M-II 17, 35, 48)

The Court's belief that Officer Taylor observed a glassine bag was significant in the finding of probable cause.

Glassine bags are one of the common means of packaging and transporting narcotics. Different inferences are properly drawn from possession of such a bag than from possession of a medicine bottle. Consequently the Court's conclusion of law was based on a significant mistake in finding the facts. As such, it must be reversed.

IV. IT WAS ERROR TO DENY APPELLANT'S MOTION TO VACATE FINDING OF GUILT AND DISMISS THE INDICTMENT BECAUSE THE INDICTMENT DID NOT CHARGE AN OFFENSE OVER WHICH THE COURT HAD JURISDICTION

In Watson v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 21,186, July 15, 1970), the Court said:

> For the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds, is surely not at a loss to know how to do so... To the extent that he wishes to assert that the statutes are not to be read as applicable to him, his primary attack should, as amicus suggests, be by a motion to dismiss. Such a motion would presumably make an alternative claim of the constitutional defectiveness under Robinson, of the statutes as applied to him. (footnotes omitted) (Slip opinion, p. 21-2)

Appellant sought to invoke the teaching of Watson, which was decided by this Court after the Trials Court's finding of guilt but before sentencing. In a motion to dismiss the indictment and the finding of guilt thereon, appellant attacked the indictment's failure to charge acts of trafficking and in the alternative, claimed that the statute could not constitutionally reach her since she was a non-trafficking addict possessor.

In United States v. Cortez Ashton, ___ F. Supp. ___ (Criminal No. 1524-69, decided October 10, 1970), Judge Gesell concluded that the Court of Appeals intended the treatment of the constitutional issues in Watson to be taken

seriously. Relying upon the following quotation from Watson, Judge Gesell found the mandate of that decision clear:

> So it is that, if Robinson's (Robinson v. California, 370 U.S. 660 (1962)), deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature. (Slip opinion, p. 19)

Thus addiction and possession of narcotics for personal use by an addict may not be made criminal. To charge a crime, under the Harrison Act an indictment must set forth that the defendant either is not an addict or that, although an addict, defendnat trafficks in narcotics for purposes other than to support his own habit. United States v. Ashton, supra, (memorandum opinion, p. 4). Failure to do so renders the indictment "subject to dismissal as not stating a crime which the court has jurisdiction to try." Watson, supra at 23.

The indictment in the instant case does not charge defendant with trafficking or with being a non-addict. It states only that she "purchased, dispensed and distributed ...seventeen capsules..." As the Court noted in Ashton, "[I]t is a matter of common knowledge that most addicts sell narcotics from time to time to finance their habit, or trade heroin for the favor of food or lodging, or give drugs to

friends facing withdrawal. If acts of this type constitute trafficking, the possession exemption suggested by Watson will prove nearly meaningless, for its primary effect will be only to alter prosecutorial techniques." United States v. Cortez, Ashton, supra at 4. Since the indictment failed thus to define criminal acts falling outside the zone of protection defined by Watson, Robinson, and Ashton, it fails to set forth an essential element of the offense.

An indictment lacking essential elements fails to set forth an offense over which the District Court has jurisdiction. Williams v. District of Columbia, 136 U.S. App. D.C. 56, 419 F.2d 638 (1969). In such a situation, the proper remedy is by motion to dismiss the indictment under Rule 12(b) (2), Fed. R. Crim. P., which may be made at any time "during the pendency of the proceeding." Finn v. United States, 256 F.2d 304 (4th Cir. 1958), United States v. Rosenson, 291 F. Supp. 867 (E. D. LA. 1968).

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE FINDING OF GUILT AND DISMISS INDICTMENT WITHOUT HOLDING A HEARING TO DETERMINE IF APPELLANT WAS A NON-TRAFFICKING ADDICT AT THE TIME OF THE OFFENSE

The Trial Court denied appellant's Motion to Vacate Finding of Guilt and Dismiss Indictment on August 19, 1970, stating no reasons for its action. Later, at sentencing, appellant's counsel requested the Court to hold a hearing to determine if defendant was an addict at the time of the offense. (S-6,7) In refusing,the Court suggested three grounds. First, such a motion "probably ought to be raised at the time of trial." (S-7) Second, the probation report indicated that appellant denied using drugs since her last pregnancy. Third, there was some evidence in the probation report that appellant "had been a pusher or aiding a pusher." (S-7)

Appellant cannot be denied her right to raise a constitutional defense simply because it was not recognized in its present form at the time of trial.[9/]

9/ Prior to trial appellant raised the issue of whether a narcotic addict could constitutionally be subject to the penalties under the statutes concerned when she filed a Motion to Set Aside Mandatory Sentence Provisions. The rationale of this motion was founded on the opinion of the original panel in Watson v. United States, (No. 21,186, decided December 13, 1968, vacated April 18, 1969)

Leary v. United States, 395 U.S. 6 (1969); United States v. Rosenson, 291 F. Supp. 867 (E. D. La. 1968).

Whether appellant was an addict at the time of her pregnancy or at the time of trial is irrelevant. The status protected by Robinson and Watson is that of an addict at the time the offense is committed. Appellant alleged in her motion that she was an addict at that time, which, incidentally, antedated both her pregnancy and trial by several months.[10/]

The Trial Court's reliance on information in the probation report that appellant was a pusher or aiding a pusher at the time of the offense denied her fundamental rights of due process and confrontation guaranteed by the Fifth and Sixth Amendments. At best, the information was imprecise and vague. At worst, it was uncorroborated hearsay considered ex parte with no right afforded appellant to confront or cross-examine. Her status at the time of the offense was crucial, turning on disputed issues of fact. A hearing where appellant could present evidence and confront the witnesses

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10/ The Court's reference to appellant's abstinence from narcotics since her last pregnancy meant that appellant had not used drugs for a period of ten months prior sentencing in August 1970. At sentencing appellant's counsel represented to the Trial Court that appellant had given birth to triplets sometime during the month prior to sentencing, and that two of the children were still in the hospital. (S.4) Assuming even a ten month gestation, appellant's pregnancy must have begun about October 1969. Though this was prior to trial, it was subsequent to appellant's arrest in March 1969.

against her was therefore essential. Goldberg v. Kelly, 396 U.S., ___ (1970)

The proper procedure was suggested in Watson and subsequently reaffirmed in Kleinbart v. United States, ___ U.S. App. D.C. ___, ___ F.2d. ___ (No. 21,408 Oct. 9, 1970) (Slip opinion p.7). Failure to hold a hearing to permit appellant to demonstrate that she was a non-trafficking addict at the time of her arrest was error.

CONCLUSION STATING PRECISE RELIEF SOUGHT IN THIS CASE

If the Court agrees with Argument IV, counsel submits that the judgment of conviction should be reversed with instructions that the indictment be dismissed.

If the Court does not agree that the indictment should be dismissed, but agrees that appellant is entitled to a hearing to determine if she was addicted to narcotics at the time of the offense, counsel submits that the judgment of conviction should be reversed and remanded for such a hearing.

If the Court does not agree that the indictment should be dismissed, but agrees with either Part A or B of Argument I or Argument II, counsel submits that the judgment of conviction should be reversed and the case remanded with an order that the evidence be suppressed.

If the Court disagrees that the evidence should be suppressed, but agrees that the Findings of Fact are clearly erroneous, counsel submits that the judgment of conviction should be reversed and the case remanded for further hearing.

Respectfully submitted,

Charles D. Hickey
Public Defender Service
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Washington, D.C. 20001

Stuart S. Greenfeig
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been hand delivered upon the Office of the United States Attorney, United States Courthouse, this 11th day of February, 1971.

Charles D. Hickey

APPENDIX

AFFIDAVIT IN SUPPORT OF A UNITED STATES COMMISSIONERS SEARCH WARRANT FOR THE PREMISES, 1423 Harvard St., N.W. Apt. #208, Washington, D.C. Entire premises occupied by a Subject known as Charles Westley Harris and an arrest warrant for the same subject, Charles Westley Harris, ~~described as a Negro Male,~~* 29 years, 6', 170 lbs.

Prior to March 17, 1969, Officer James R. Johnson of the Tenth Precinct received information from a source that stated that it had been buying heroin from a man it knew as Charles, described above, out of the premises 1423 Harvard Street, N.W. apt. #208, Washington, D.C. This source further stated that it has been buying heroin from Charles out of the aforementioned premises for about 1 week, the last time yesterday, March 16, 1969. This source stated that on occasions it has purchased

*. Deleted and initialed by [illegible]

AFFIDAVIT IN SUPPORT OF A UNITED STATES COMMISSIONERS SEARCH WARRANT FOR THE PREMISES, 1423 Harvard St., N.W., Apt. #201, Washington, D.C. Entire premises occupied by a subject known as Clarence Harris, Jr., and an arrest warrant for the same subject, Clarence Harris, Jr., described as a Negro Male, ~~32 years, 6'-2"~~* Black frame glasses.

Prior to March 17, 1969, Officer James R. Johnson of the Tenth Precinct received information from a source that stated that it had been buying heroin from a man it knew as Clarence, described above, out of the premises 1423 Harvard St., N.W., Apt. 201, Washington, D.C. This source further stated that it has been buying heroin from Clarence out of the aforementioned premises for about 1 week, the last time yesterday, March 16, 1969. This source stated that on occasions it has purchased heroin from Clarence out of the

* Deleted and initialed by

Heroin from Charles out of the premises, 1423 Harvard St.,N.W., Apt. #208, Washington, D.C.
The Narcotic would be secreted in the bedroom, on the dinning room table or on his person, the man known as Charles. This source stated that it would be willing to make a purchase of Heroin from the man it knew as Charles out of the premises, 1423 Harvard St., N.W., Apt.#208, Washington, D.C. for the Vice Squad.

On March 17, 1969, the above mentioned source, who has provided members of the Tenth Precinct Vice Office with information which has resulted in the arrest of more than 10 violators for violations of the Gambling and Liquor laws of the District of Columbia and on more occasions which has resulted in obtaining search warrants for violations of the Gambling and Liquor Laws of

premises, 1423 Harvard St., N.W., Apt. #201, Washington, D.C.
The Narcotic would be secreted in the dining room on the dining room table or on his person, the man known as Clarence. This source stated that it would be willing to make a purchase of heroin from the man it knew as Clarence out of the premises, 1423 Harvard St., N.W., Apt. #201, Washington, D.C. for the Vice Squad.

On March 17, 1969, the above mentioned source, who has provided members of the Tenth Precinct Vice Office with information which has resulted in the arrest of more than 10 violators for violations of the Gambling and Liquor Laws of the District of Columbia and on more occasions which has resulted in obtaining search warrants for violations of the Gambling and Liquor Laws of the District of Columbia. The

the District of Columbia. The above mentioned Source met with Officer J.R. Johnson and Marcellous B. Taylor in the vicinity of 1423 Harvard St., N.W. She got into the car being driven by Officer Taylor and was searched and found to be free of any money or Narcotic drugs. Officer Taylor gave the source a sum of MPDC advanced funds and the source was driven to the vicinity of 1423 Harvard St., N.W., Washington, by Officer Taylor of the Tenth Precinct Vice Squad. The source then left Officer's Taylor car and was observed by Officer Taylor to walk directly to the premises, 1423 Harvard St., N.W. and to Apt. #208 where it entered. A short time later Officer Taylor observed the source leave the premises and rejoin Officer Taylor. The source was then driven a short dis-

above mentioned Source met with Officer J. R. Johnson and Marcellous B. Taylor in the vicinity of 1423 Harvard St.,N.W. She got into the car being driven by Officer Taylor and was searched and found to be free of any money or Narcotic drugs. Officer Taylor gave the source a sum of MPDC advanced funds and the source was driven to the vicinity of 1423 Harvard St., N.W., Washington, by Officer Taylor of the Tenth Precinct Vice Squad. The source then left Officer's Taylor car and was observed by Officer Taylor to walk directly to the premises, 1423 Harvard St., N.W. and to Apt. #201 where it entered. A short time later, Officer Taylor observed the source leave the premises and rejoin Officer Taylor. The source was then driven a short distance from the above mentioned premises where it was searched

tance from the above mentioned premises where it was searched and 2* capsules was seized which contained a quantity of white powdered substance. The source advised Officer Taylor that when it left the car of Officer Taylor, it walked directly in the premises, 1423 Harvard St., N.W. and into Apt. #208, knocked on same and was admitted into the premises by the man it knew as Charles Harris. The source further advised Officer Taylor that after it had entered the premises it told Charles that it wanted to buy some Heroin and that Charles walked to the bedroom, returned shortly with 2 capsules of white powdered substance. The Source then gave Charles the sum of MPDC advanced funds. The source stated that there was about

and 1 capsule was seized which contained a quantity of white powdered substance. The source advised Officer Taylor that when it left the car of Officer Taylor, it walked directly in the premises, 1423 Harvard St., N.W., and into Apt. #201, knocked on same and was admitted into the premises by the man it knew as Clarence Harris, Jr. The source further advised Officer Taylor that after it had entered the premises it told Clarence that it wanted to buy some heroin and that Clarence walked into the bedroom, returned shortly with 1 capsule of white powdered substance. The source then gave Clarence the sum of MPDC advance funds. The source stated that there was about 5 people in the premises, all of which he had noticed had needle marks on their arms.

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* Deleted and initialed by M.B.T.

10*people in the premises all of which it had noticed had needle marks on their arms. She stated that it heard one subject yell, hurrah and come out of the bathroom so I can Take-off. The source advised that when it left the premises of 1423 Harvard St., N.W., Apt. #208, Washington, D.C. it walked directly to where Officer Taylor was waiting in his auto.

Officer Richard A. Bias of the Narcotic Squad performed a preliminary field test on a portion of the powder that he received from Officer Taylor and received a positive color reaction indicating the presence of a Narcotic drug of the Heroin group.

Investigations revealed that the apt. 208, 1423 Harvard St., N.W., Washington, D.C.

* Deleted and initialed by M.B.T.

She stated that it heard one subject yell, "Hurrah, and come out of the bathroom so I can Take-off." The source advised that when it left the premises of 1423 Harvard St., N.W., Apt. #201, Washington, D.C., it walked directly to where Officer Taylor was waiting in his auto.

Officer Richard A. Bias of the Narcotic Squad performed a preliminary field test on a portion of the powder that he received from Officer Taylor and received a positive color reaction indicating the presence of a Narcotic drug of the heroin group.

Investigations revealed that the Apt. #201, 1423 Harvard St., N.W., Washington, D.C., was listed to a Sherrin Williams. It revealed further that a subject by the name of

was listed to a Sherrin Williams. It revealed further that a subject by the name of Clarence Harris, Jr., brother of the above mentioned subject also frequented the premises, this subject has been arrested and convicted of numerous narcotic charges.

Because of the information received along with the events of March 17, 1969, the under-signed officer does believe that there is now illicit narcotic drugs being secreted inside the premises, 1423 Harvard St., N.W., Apt. #208, Washington, D.C. by Charles Westley Harris, described above.

/s/Marcellous B. Taylor
Marcellous B. Taylor
Officer
Tenth Precinct,MPDC

Subscribed to and sworn to before me this 17th day of March, 1969

/s/ William C. Pryor
JUDGE

Clarence Harris, Jr., brother of the above mentioned subject also frequented the premises, this subject has been arrested and convicted of numerous narcotic charges.

Because of the information received along with the events of March 17, 1969, the under-signed officer does believe that there is now illicit narcotic drugs being secreted inside the premises, 1423 Harvard St., N.W., Apt. #201, Washington, D.C. by Clarence Harris, Jr., described above.

/s/ Marcellous B. Taylor
Marcellous B. Taylor
Officer
Tenth Precinct, MPDC

Subscribed to and sworn to before me this _____ day of March, 1969.

/s/ William C. Pryor
JUDGE

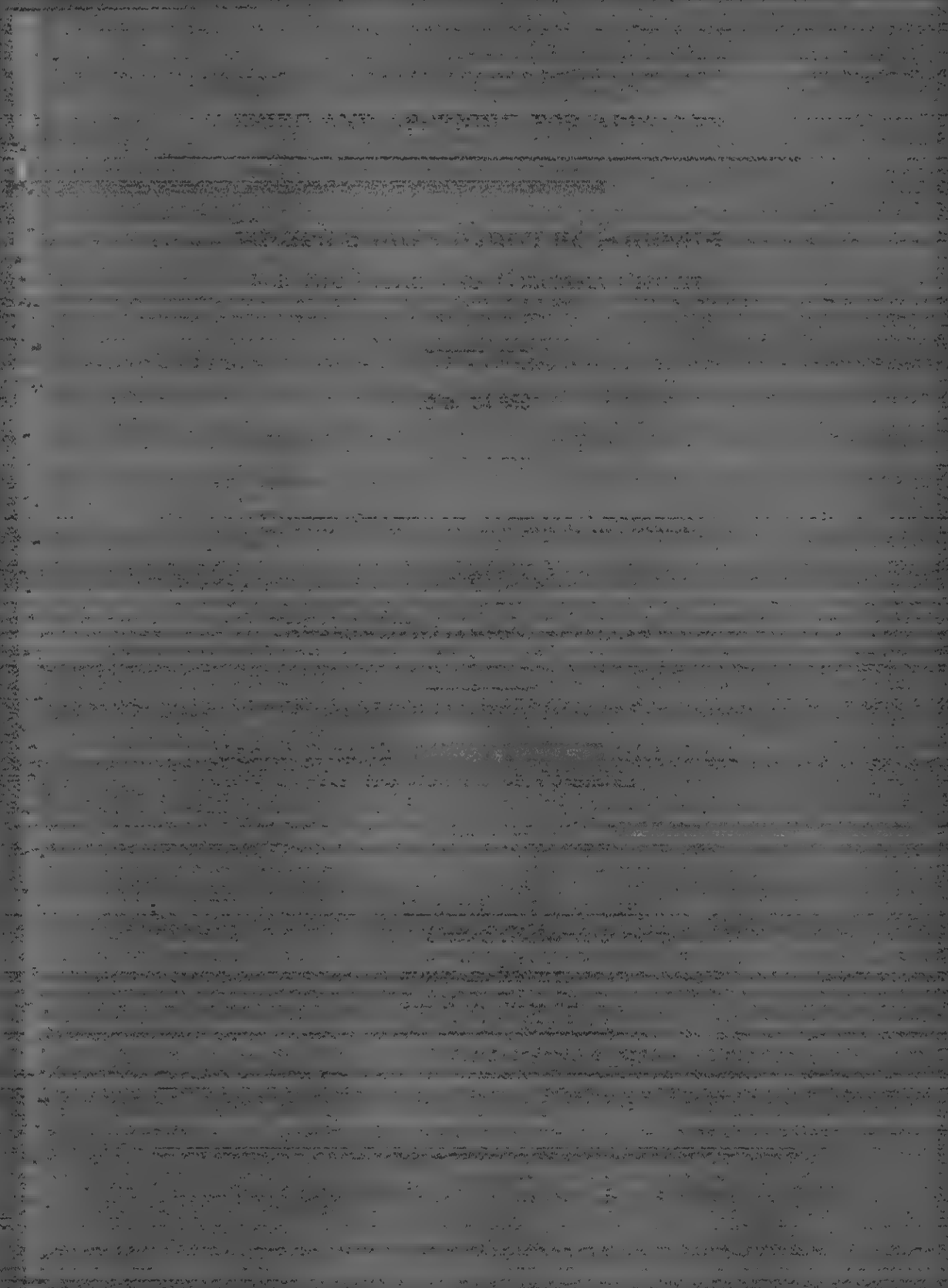

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Whether there was probable cause, made up from untainted information acquired by the police, to arrest appellant?

II. Whether the discussion in dicta in *Watson* v. *United States* of the possible objections that a non-trafficking addict might make to an indictment charging "possession" under the federal narcotic statutes applies in any way to appellant, where:

(a) she was convicted on May 19, 1970, and *Watson* was handed down on July 15, 1970;
(b) the first request for consideration of her case in light of *Watson* was made on August 17, 1970;
(c) she concededly was not an addict either at the time of trial or at the time of sentencing, and there was no offer of proof to show that she was an addict on the date of the offenses; and
(d) there was evidence that she was engaged in trafficking at the time of her arrest?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,660

UNITED STATES OF AMERICA, APPELLEE

v.

SHARON WILLIAMSON, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a two-count indictment filed on July 24, 1969, with violations of 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174. Her case came on for trial on May 19, 1970, before Judge John H. Pratt. After Judge Pratt denied appellant's pre-trial motion to suppress evidence,[1]

[1] Other evidence in support of the motion to suppress was received by Judge Pratt on May 5, 1970. This evidence consisted of the testimony of Antoinette Harris. The transcript of this hearing will be referred to, in accordance with appellant's system, as "M.I." Reference to other transcripts in the record will also be made according to the same system, namely: "M.II" for the transcript of the proceedings held on May 19, 1970, and "S." for the transcript of appellant's sentencing on August 26, 1970.

the case was tried to the court on the basis of the evidence adduced at the pre-trial hearing and stipulations by counsel. Appellant was found guilty of the first count of the indictment, which charged a violation of 26 U.S.C. § 4704 (a).[2] On August 26, 1970, appellant was sentenced by Judge Pratt to a prison term of two to six years. This appeal followed.

A. Appellant's Motion to Suppress

On March 17, 1969, Detective Marcellous B. Taylor of the Metropolitan Police submitted two affidavits[3] to Judge Pryor of the then Court of General Sessions in support of his request for two search warrants and two arrest warrants. One affidavit, received in evidence as Defendant's exhibit No. 1 (hereafter referred to as affidavit No. 1), was in support of a request for a search warrant for apartment 208 in the building at 1423 Harvard Street, Northwest, and for an arrest warrant for one Charles Harris. In essence, it stated that Charles Harris had sold narcotics to an informant on several occasions during the week preceding March 17, 1969, from apartment 208, which was listed to appellant.[4] Officer Taylor himself had typed this affidavit. The other one, affidavit No. 2, was typed by a secretary in the office of the Metropolitan Police Department's Narcotics Squad. She used affidavit No. 1 as a model and inserted changes in accordance with Detective Taylor's statement to her of the particular circumstances of the informant's purchase of narcotics in apartment 201 of the same premises (M. II 10-13). This second affidavit was in support of a search warrant for apartment 201 and an arrest warrant for one Clarence Harris. Similar to affidavit No. 1, it related that an informant had purchased narcotics from Clarence Harris

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[2] No finding was made as to the second count, brought under 21 U.S.C. § 174, which was dismissed by the Government at the time sentence was imposed (M.II 77).

[3] These affidavits are reprinted in the appendix, *infra*, pp. 23-28.

[4] The affidavit misspelled her name as "Sherrin Williams".

several times during the week prior to March 17 and went on to state that Clarence Harris had conducted these transactions in apartment 201, which was listed to appellant.[5]

At the hearing on the motion to suppress Detective Taylor admitted that affidavit No. 2 was in error in stating that apartment 201 was listed to appellant. The actual tenant was one Randolph J. Taylor (M. II 18-19, 58-59). He also acknowledged that statements in affidavit No. 2 suggesting that apartment 201 was a one-bedroom apartment—rather than the efficiency which it actually was—were mistaken (M. II 19-20). But he made clear that the informant had made two purchases on March 17, one in apartment 201 and the other in apartment 208. He stated flatly that all of the information in affidavit No. 1 was correct (M. II 12-13).

Four warrants were issued on March 17 after Judge Pryor approved Detective Taylor's affidavits. Two were search warrants authorizing searches of apartments 201 and 208, and two were arrest warrants, for Clarence Harris and Charles Harris. The following day, March 18, the detective executed both search warrants and the arrest warrant for Clarence Harris. During the search of appellant's apartment, number 208, a quantity of narcotics was recovered, and appellant, who was present during the search, was arrested by Detective Taylor (M. II 14, 20-21, 26).[6]

The arrest warrant for Charles Harris remained outstanding (M. II 14). On March 30 Detective Taylor received information that Charles Harris was in apartment 201 at 1423 Harvard Street. He assembled a party of officers to help him and proceeded to the apartment building, arriving at 5:00 a.m. Taylor deployed some of the officers accompanying him to watch the rear windows of

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[5] Once more her name was misspelled "Sherrin Williams".

[6] Appellant was charged with a violation of the Harrison Narcotics Act, but the case was nolle prossed after it had been presented to the grand jury.

apartment 201, and also to observe apartment 208 (M. II 15, 23, 36). He proceeded to apartment 201, knocked on the door, identified himself and announced that he had a warrant for Charles Harris' arrest. The response from inside was a toilet flushing and a great deal of commotion (M. II 15, 36). Three of the people in the apartment, Harold Legon, Vincent Harris and his wife Antoinette, fled through the rear window onto the fire escape running along the rear of the building (M. I 10-11, 13-14; M. II 44).

Detective Taylor forced his way into the apartment and found Charles Harris and several others inside. All were placed under arrest. Narcotics paraphernalia were found in the apartment (M. II 15-16, 22-28). While Detective Taylor was securing the apartment, Officer Hewitt Brantley, one of the men who had been stationed at the rear of the building, stuck his head in the window and told him that Legon had run along the fire escape and jumped through an open window into appellant's apartment, number 208 (M. II 15, 37, 44). Officer Brantley then took off after Vincent and Antoinette Harris and captured them on the roof of the building (M. II 44, 46).

Taylor meanwhile left apartment 201, went around to apartment 208 and knocked on the door. Appellant asked who it was, and when the detective identified himself, she opened the door and invited him inside (M. II 16, 30, 37-38, 48). Officer Brantley just then was entering the apartment through the window with Antoinette and Vincent Harris, and Detective Taylor went across the room to help Mrs. Harris through the window and to talk with the officers who had arrested Legon in appellant's apartment. After a few moments with them, he turned his attention to appellant and noticed that she had her hand cupped around two plastic prescription-type vials. He could see white capsules in the bottom part of the vials and concluded [7] that they were narcotics of some sort (M.

[7] Detective Taylor, in making this deduction, was relying in large measure upon his experience in dealing with narcotics violators. Approximately 60% of his work on the Vice Squad since 1965 had involved narcotics (M. II 9, 35).

II 16-17, 30, 34-35, 37). Appellant, after some discussion with Taylor,[8] opened her hand and gave him two plastic vials and a small box. She was immediately placed under arrest. A field test on the capsules found in the vials, conducted on the scene by an officer from the Narcotics Squad, indicated that they contained narcotics (M. II 17-18).[9]

Appellant took the stand and testified that Legon had burst through her window while she was in the bathroom. She came out, and Legon told her that he was fleeing from the police who were in apartment 201. Appellant told him that he could not hide in her apartment. She then discovered three medicine bottles on the floor near where he was standing. Even though she "had an idea it was narcotics," she picked them up and was about to dispose of them when several officers came through the window and arrested Legon. At this point, she continued, Detective Taylor knocked and she admitted him. In her version of what happened, Taylor, after conferring with the officers holding Legon, returned to her and snatched from her hands a pair of pants, which she proclaimed were her own, and searched them. Finding nothing but a few dollars in the pockets, he returned them to her and asked what she had in her hand. Appellant said she had nothing, but after he warned that she could be searched by a policewoman, she surrendered the bottles.[10] She then told Taylor that the bottles had been dropped by Legon when

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[8] On cross-examination Detective Taylor could not remember whether he told appellant that he would have a policewoman search her if she did not give up the vials (M. II 34). Appellant and her cousin-in-law, Antoinette Harris, testified that Taylor did make such a statement (M. I 3, 7; M. II 49).

[9] Counsel later stipulated to the chemist's report, which showed that the contents of all of the capsules in both bottles totaled 1064 milligrams of heroin hydrochloride and other substances (M. II 75-76).

[10] On cross-examination appellant stated that she had only one bottle in her hand (M. II 52).

he entered. Appellant admitted she was trying to hide the narcotics because the police had recovered narcotics from her apartment during the search on March 18, and she did not want to get into further trouble (M. II 47-55).[11]

Appellant's motion to suppress was based on three contentions. First, she argued that her arrest was invalid inasmuch as it was based in part on information acquired during the execution, on March 18, of the search warrants which were so contradictory as to be "totally incredible." Second, she asserted that the warrantless entry into her apartment was illegal. Third, she contended that even if the police were properly in her apartment, it was unreasonable for them to search her.[12] The court ruled that the entry of Detective Taylor into apartment 208 was consented to by appellant and that he seized narcotics from appellant's hand which were in plain view (M. II 63, 65, 72). As for the warrants, the court felt that it was not necessary to pass on them, but noted that in any case the warrants based on affidavit No. 1, prepared by Detective Taylor,[13] were clearly valid (M. II 64, 72-73).

B. Sentencing

Appellant was sentenced by the court on August 26, 1970. On August 17, however, she filed a motion to vacate the finding of guilt and to dismiss the indictment. The basis for the motion was appellant's claim that she was addicted to narcotics at the time of her arrest and was therefore entitled to benefit from dicta in this Court's then recent decision in *Watson* v. *United States*, D.C.

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[11] Testifying in rebuttal, Detective Taylor stated (1) that the pants held by appellant were very small, suitable for a child, (2) that appellant did not tell him she had received the narcotics from Legon, and (3) that he had seized not one but three packages from her hand (M. II 56-57).

[12] See the memorandum of points and authorities in support of appellant's motion to suppress evidence, filed May 8, 1970, pp. 1-5.

[13] *I.e.*, the search warrant for appellant's apartment, number 208, and the arrest warrant for Charles Harris. See appendix A, *infra*, pp. 23-25.

Cir. No. 21,186, decided July 15, 1970, which suggested that a non-trafficking addict possessor of narcotics might not be prosecuted under the federal narcotics laws. The trial judge denied the motion without a hearing on August 19. At the sentencing proceedings, however, he gave three reasons for his decision. First, he doubted whether appellant was ever addicted to narcotics, especially since the presentence report indicated she was not even using drugs at the time of trial (S. 3, 7). Second, he indicated that a *Watson*-type motion "probably ought to be raised at the time of trial" (S. 7). And last, he noted that the presentence report also indicated that appellant herself was a trafficker or was aiding someone else who was trafficking in narcotics (S. 7-8).

As for the sentence, counsel urged that appellant be granted probation, largely because she was no longer using narcotics and because she had six children—including a recently-born set of triplets—at least four of whom she cared for herself (S. 2-4).[14] The court remarked that appellant presented a "difficult case" and imposed a sentence of two to six years.

ARGUMENT

I. The presence of narcotic capsules in plain sight in appellant's hand provided probable cause to arrest her, and none of the information upon which the officer relied in determining whether to arrest her was tainted.

(M. II 13, 16-17, 30-37, 48-53, 66, 72)

Appellant challenges the seizure by Detective Taylor of the medicine vials containing heroin capsules, along with her resulting arrest, on the ground that probable cause was lacking because the detective, as he confronted her, did not have sufficient information to justify a reasonable belief that the vials contained narcotics. This con-

[14] Two of the older children were being raised by grandparents. Appellant was unmarried (S. 3-4).

clusion is erroneous, for it is based on a faulty method of calculating probable cause.

In *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 357-358, 389 F.2d 305, 308-309 (1967), this Court set out a now-classic definition of probable cause:

> Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case. It has been said that, "'[t]he substance of all the definitions of probable cause' is a reasonable ground for belief of guilt.'" *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Much less evidence than is required to establish guilt is necessary. *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959). The standard is that of "a reasonable, cautious and prudent peace officer" and must be judged in the light of his experience and training. *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958). The police must have enough information to "warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). *See also Henry* v. *United States*, *supra*, 361 U.S. at 102. A finding of probable cause depends on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, *supra*, 338 U.S. at 175.

A premise underlying this formulation which needs to be elucidated in this case is that probable cause should be determined from all of the factors confronting the officer *taken together*, and not from viewing them in isolation from one another. *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961).

Under these standards Detective Taylor clearly had probable cause to seize the bottles from appellant's hand and arrest her for possession of narcotics. He had pursued a fugitive from a drug raid, Legon, to appellant's apartment. This apartment had been known to him prior

to March 17 as the site of narcotics transactions.[15] He had been to the same apartment himself on March 18 and had found narcotics there and arrested appellant for a narcotics violation. On the date in question, March 30, he observed appellant holding small bottles in the bottom of which he could plainly see several white capsules. She had attempted to secrete them under her arm and refused at first to open her hand when asked to do so. On the basis of his experience and expertise,[16] it was certainly reasonable for him to conclude that appellant was holding contraband in her hand and to seize it from her. *See Kleinbart* v. *United States*, D.C. Cir. No. 21,408, decided October 9, 1970; *United States* v. *Harrison*, 139 U.S. App. D.C. 266, 432 F.2d 1328 (1970); *Redmon* v. *United States*, 355 F.2d 407 (9th Cir. 1966).

Appellant, however, discusses the various factors we have mentioned as if each were the only bit of evidence confronting the detective. It might be true, of course, that having a fugitive from a narcotics raid burst into one's apartment, or past association with narcotics dealers, or possession of an innocuous-looking medicine bottle containing white capsules, or mere refusal to open one's hand at the request of a police officer would not support probable cause. But when viewed *in conjunction with one another*, these elements make out probable cause to an experienced police officer. As noted in *Dixon* v. *United States*, *supra*, "The decisive factors are that all the circumstances are to be considered together, in a sum total." 111 U.S. App. D.C. at 306, 296 F.2d at 428. It is this obvious principle which appellant's analysis overlooks.

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[15] See appendix A, *infra*, pp. 23-25.

[16] See footnote 7, *supra*. *See also Bell* v. *United States*, *supra*, where Judge Prettyman, writing for the Court, noted, "An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance." 102 U.S. App. D.C. at 307, 254 F.2d at 86. The same, of course, is true in the case of the white pills in the medicine bottles in this case; in the abstract they bear no proof of crime, but to an experienced narcotics officer in the circumstances of this case they are strong evidence of illicit conduct.

Appellant presents a further contention. She claims that Detective Taylor, in deciding whether probable cause existed, was not entitled to rely on information about her which he obtained while executing the search warrant in her apartment on March 18. The foundation for this argument is the thesis that all four warrants issued on March 17 were invalid because the two affidavits submitted by Detective Taylor contradicted each other on their face to such a degree that there was no support for the finding of probable cause by Judge Pryor. Since this rendered the search of her apartment and her arrest illegal, it follows, according to appellant, that the information turned up that day was tainted and could not support the probable cause determination on the 30th.

We find this theory unpersuasive in every respect. In the first place, the warrants issued on March 17 were valid. The affidavits individually showed probable cause. Each told of a narcotic sale made in a single apartment to a reliable police informant and of similar purchases made by the same informant from the same seller in the same aparament over the week preceding March 17.[17] Further, reading the two together, we profess considerable difficulty in understanding how appellant can claim that these affidavits "impeach" each other so that "[o]ne of [them] was obviously false." [18] By our calculation they *differ* in only five particulars. Four of these are the apartment involved, the number of persons in each apartment, the number of capsules sold to the informant, and the name of the person making the sale. None of these, obviously, are logical contradictions which might vitiate the sense of either document (or of the two read together). They are simply differences, not contradictions. The only logical contradictions we have found is the assertion in each affidavit that the informant traveled directly from the police car to the particular apartment

[17] See appendices A and B, *infra*, pp. 23-28. An almost identical factual pattern was contained in an affidavit, approved *sub silentio*, in *United States* v. *Harrison*, *supra*.

[18] Brief for appellant at 17-18.

in question and back again.[19] This "impeachment," along with a statement repeated in both affidavits which apparently could not have been made in *both* apartments,[20] do not detract from probable cause. These defects go only to collateral matters, and even with these parts removed, the remaining portions of the affidavits show probable cause. *See Rugendorf* v. *United States*, 376 U.S. 528, 532 (1964); *United States* v. *Castle*, 213 F.Supp. 56 (D.D.C. 1962), *aff'd*, 120 U.S. App. D.C. 398, 347 F.2d 492 (1964), *cert. denied*, 381 U.S. 929 (1965). This Court stated recently in *James* v. *United States*, 135 U.S. App. D.C. 314, 315-16, 418 F.2d 1150, 1151-1152 (1969):

> When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue.

By analogy, even assuming the affidavits "impeach" each other in the two respects we have mentioned, the question is merely whether, putting those portions aside, a probable cause finding can be supported by the rest of the affidavit.[21] The answer is yes, under a "commonsense reading of [both] affidavit[s]," [22] for nothing of the essentials

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[19] Detective Taylor testified that, as a matter of fact, the informant went to both apartments and made purchases there before returning to his car (M. II 12-13).

[20] According to both affidavits, an occupant of each apartment, in the informant's presence, yelled "Hurrah" and came out of the bathroom. Conceivably this same incident could have taken place in each apartment, but, fairly viewing the probabilities, we think it unlikely that it recurred in such a fashion.

[21] *See also United States* v. *Sterling*, 369 F.2d 799, 802 (3d Cir. 1966); *Chin Kay* v. *United States*, 311 F.2d 317, 321 (9th Cir. 1962); *Clay* v. *United States*, 246 F.2d 298, 304 (5th Cir. 1957); *cf. Masiello* v. *United States*, 113 U.S. App. D.C. 32, 304 F.2d 399 (1962).

[22] *Spinelli* v. *United States*, 393 U.S. 410, 415 (1969); *see United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).

of the informant's contacts with the apartments and the sales conducted there by Clarence and Charles Harris is disturbed by blotting out the route the informant took to get to the apartments and a random utterance made by one of the occupants in one apartment.

Alternatively, we point out that even under the logic of appellant's argument, one of the affidavits must have been accurate; hence one search warrant and one arrest warrant were valid. According to Detective Taylor, this accurate affidavit was the one supporting the search warrant for appellant's apartment (No. 208) and the arrest warrant for Charles Harris (see affidavit No. 1, appendix A, *infra*, pp. 23-25; M. II 13). It was only during the execution of *these warrants, i.e.*, the search of appellant's apartment on March 18 and the arrest of Charles Harris on March 30, that evidence employed in determining probable cause against her was obtained.[23] There is, accordingly, no occasion to pass on the question of taint or whether there was an independent source for Officer Taylor's decision to arrest appellant on March 30. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Wayne* v. *United States*, 115 U.S. App. D.C. 234, 318 F.2d 205 (1963).[24]

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[23] It is not clear from the record where Clarence Harris was arrested on March 18. If he was arrested in appellant's apartment pursuant to an arrest warrant which we are assuming for the moment was invalid, the fact that the officers were on the premises pursuant to two *valid* warrants (for Charles Harris' arrest and the search of apartment 208) would probably nullify any taint.

[24] We find no substance to appellant's other arguments in connection with the seizure of the narcotics and her arrest. Conceding that she invited Detective Taylor into her apartment (see M. II 48-51), appellant claims that the scope of the consent extended only to removing Legon and did not permit the officer to conduct a search. The difficulty with this proposition is that Taylor did not conduct a search; he merely seized narcotics capsules which were in plain view (M. II 16-17, 30-37). *See United States* v. *Thweatt*, —— U.S. App. D.C. ——, 433 F.2d 1226 (1970); *Creighton* v. *United States*, 132 U.S. App. D.C. 115, 116, 406 F.2d 651, 652 (1968); *cf. United States* v. *Harrison, supra; Dorman* v. *United States*, —— U.S. App. D. C. ——, 435 F.2d 385 (1970) (*en banc*). The scope of the consent is not even in issue here, for once consent is given—for any purpose—an officer surely may seize contraband

II. This Court's opinion in *Watson* v. *United States*, has no applicability whatsoever to appellant's case.

(S. 2-8)

In *Watson* v. *United States*, D.C. Cir. No. 21,186, decided July 15, 1970 (*en banc*), this Court held that a narcotic addict with two previous felony convictions is still eligible for narcotic rehabilitation under Title II of the Narcotic Addict Rehabilitation Act (NARA), 18 U.S.C. § 4251 (f) (4), if the two previous convictions were, in effect, for the mere possession of heroin. The opinion concluded that "the two prior felony disqualifying exclusion of Title II, as applied to appellant on these facts, is unconstitutional under the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment." Slip op. at 29. Left for future determination were the more difficult questions: (1) whether the federal narcotics "possession" statutes[25] were intended by Congress to apply to non-trafficking addict possessors and (2) whether such prosecution would be in violation of the Eighth Amendment in light of *Robinson* v. *California*, 370 U.S. 660 (1962). *See Watson*, *supra*, slip op. at 19. Though invited to do so, the Court refused to answer these questions in Watson's own case because

> it is vital that a person charged under these statutes who defends on these grounds should do so clearly

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he sees in front of him. Hence appellant's cited case, *Williams* v. *United States*, 105 U.S. App. D.C. 41, 263 F.2d 487 (1959), has no bearing here because the officer in *Williams* conducted an exploratory search after his consented-to entry into the defendant's home.

Appellant's concern over the statement made by the trial judge that appellant had a "glassine bag" in her hand (see M. II 72) strikes us as unnecessary disputation. Even if such a statement was "clearly erroneous" and should be "reversed," it can only be "reversed" in favor of a finding that appellant held a clear plastic medicine-type vial in her hand. There is no other description of these objects in the record. (See M. II 17, 34-35, 48, 50, 52-53, 66.) Amending the record with this latter fact—one we have assumed throughout our discussion—the finding of plain view, and of probable cause, can still be sustained by this Court.

[25] *Viz.*, 26 U.S.C. § 4704 (a), part of the Harrison Narcotic Act, and 21 U.S.C. § 174, part of the Jones-Miller Act.

> and unequivocally in the trial court, to the end that a record can be made of the facts upon which they rest. This was far from being the case in this instance. Slip op, at 21.[26]

The Court went on to advise that, "[f]or the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds, is surely not at a loss to know how to do so." Two methods were suggested: (1) a motion to dismiss the indictment ("[s]uch a motion would presumably make an alternative claim of the constitutional defectiveness under *Robinson*, of the statutes as applied to him") and (2) an affirmative defense at trial. *Watson, supra*, slip op. at 21-22.

The offense of which appellant was convicted, a violation of 26 U.S.C. § 4704 (a), took place on March 30, 1969, and the indictment against her was filed on July 24, 1969. She was found guilty on May 19, 1970,[27] and the case was continued for sentencing.[28] The *Watson* opinion was handed down on July 15, 1970. Appellant was sentenced on August 26, 1970. Shortly beforehand, on August 17, she filed a motion, based on the dicta in *Watson* which we have discussed briefly above, to vacate

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[26] Though concededly an addict, "appellant [Watson] made no direct effort to explain his possession of 13 capsules" (slip op. at 21; see slip op. at 2, 5-6), thereby negating, or at least neutralizing, the indicia in the record that he was engaged in trafficking. Slip op. at 21.

[27] Much of the delay between indictment and trial was attributable to appellant's failure to appear for arraignment on August 8, 1969, and her subsequent fugitivity which lasted until March 13, 1970.

[28] Prior to trial, appellant had filed a motion, inspired by the panel opinion in *Watson*, to set aside the mandatory sentence provisions of 26 U.S.C. § 7237. Grounds for this motion were appellant's alleged addiction at the time of her arrest on March 30, 1969, and the holding in *Robinson* v. *California, supra*. This motion was denied by Judge Pratt on May 8, and on this appeal that ruling is not assigned as error.

the finding of guilt[29] and dismiss the indictment. The trial judge denied this motion, as well as a request made at the time of sentencing, that he hold a hearing in order to determine, for the purpose of her "*Watson* motion," whether appellant was an addict at the time of her offense (S. 6-8). On this appeal appellant assigns as error the denial of both of these requests. In our view, however-there was no error. Appellant was convicted almost two months before *Watson* was decided and is not entitled to benefit from the forward-looking dicta in that case.[30]

Watson, in the respects relevant here, is clearly prospective. The entire discussion of the possible uses of the Eighth Amendment and arguments regarding the intent of Congress in enacting the federal narcotics laws is of course dictum. Nothing in part III of the opinion[31] is the "law of the case." It states no rule of law for immediate application, but only raises questions for future resolution in a more appropriate factual context such as: what is an "addict"?; what is the meaning of "trafficking"?; did Congress ever intend to embrace the "nontrafficking addict" possessor within the federal narcotics statutes?; in any event, does the Eighth Amendment as construed in *Robinson* forbid prosecution of the "nontrafficking addict" under these statutes?; and, at trial, who should have the burden of persuasion? This is not "law," either so far as Watson or any other defendant is concerned, for his appeal presented an inappropriate ve-

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[29] No finding of guilt was made as to the second count of the indictment, charging a violation of 21 U.S.C. § 174. This count was dismissed at sentencing.

[30] Appellant makes no claim that touches on the *holding* of *Watson*, involving the Narcotic Addict Rehabilitation Act. Appellant concedes that she was not an addict either at the time of trial or at the time of sentencing, and although the trial judge indicated at sentencing that the presentence report showed appellant was not an addict at least during her pregnancy—which extended back to about October 1969—if she ever was, appellant in her brief now states she was not even *using* drugs from October 1969 onward (S. 2-4; Brief for Appellant at 29 n.10).

[31] Slip op. at 17-24.

hicle for the statement of new rules regarding the scope of applicability of the federal narcotics statutes. "This is, in short, not the kind of a record upon which either the trial or appellate court can confidently adjudicate a serious issue of statutory construction with constitutional implications." *Watson, supra*, slip op. at 21. *Watson*, therefore, is doubly prospective. It does not state, but merely forecasts, changes in the law; and it requires a proper record, apparently one made in the District Court with the suggestions made in *Watson* itself in mind, to be developed before such new rules are crystallized.

Hence *Watson* is peculiar among innovative decisions. The next case coming before the Court will necessarily not be subject to the new theory,[32] in the main because at the heart of the opinion is the need for an adequate record. Within the terms of the opinion itself it would seem that, practically speaking, no such adequate record could be developed in any case which had been tried in the District Court prior to the day *Watson* was decided. The Court in *Watson* contemplated that these "important issues . . . can *hereafter* be meaningfully pursued by a defendant who is prepared to take his stand upon these positions and, where necessary to the exculpatory approach being advanced, to proffer the factual foundations for them." Slip op. at 22 (emphasis added).[33]

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[32] See the discussion of the relevant cases decided by this Court after *Watson*, *infra*, pp. 17-20.

[33] It is noteworthy that in the post-*Watson* period the principal tests of the meaning of the *Watson* dicta have been in cases which were called for trial rather than by post-conviction remedies. *See, e.g., United States* v. *Ashton*, 317 F. Supp. 860 (D.D.C. 1970); *United States* v. *Lindsey*, D.D.C. Cr. No. 2277-70 (opinion of Gasch, J., January 25, 1971); *United States* v. *Jones*, D.D.C. Cr. No. 1472-70; *United States* v. *Moore*, D.D.C. Cr. No. 641-70; *see also United States* v. *Williams*, D.C. Super. Ct. No. 28001-70, memorandum order of Belson, J., March 4, 1971. In his opinion in *Ashton* Judge Gesell stated:

> [T]he instant case involves a challenge to a pending indictment, rather than an effort to reopen a guilty plea or conviction, and hence the full range of substantive and procedural questions raised by the Court of Appeals [in Watson] are before the Court. 317 F.Supp. at 860.

In a like vein, the opinion, by the procedures it suggests for raising the "*Watson* issue," a motion to dismiss or an affirmative defense at trial, indicates that the new rules should be tested upon a fresh record. No mention is made of the availability of collateral attack or other post-conviction relief, and the Court refused to grant a remand even to Watson himself. Slip op. at 23. Especially significant in our view is the encouragement given to the use of subsection (b) of Rule 12, FED. R. CRIM. P., which allows a motion to dismiss to be entertained before trial. *See Watson*, slip op. at 22 n.11. It is strongly suggested that the Eighth Amendment and statutory construction arguments should be entertained no later than the trial of the general issue itself. *Ibid.* Under Rule 12(b)(2), of course, a motion to dismiss for lack of jurisdiction or failure to charge an offense may be entertained "at any time during the pendency of the proceedings." Arguably, at least, both of the objections to prosecution which *Watson* suggests could be brought up at any time. But the fact that the Court chose to focus on the portions of Rule 12 mandating determination of issues contemporaneously with the trial signifies to us that *Watson* contemplates that the benefits which it forecasts should be claimed by the end of the trial or else not at all. In this connection, moreover, the rights of the government should be considered. *Watson* alternatively allows a defendant to make his factual presentation in the form of an affirmative defense at trial. In this event, if the defendant chose to be tried by a jury, the government would then be entitled to have these issues litigated before a jury. Rule 23(a), FED. R. CRIM. P.; *see Singer* v. *United States*, 380 U.S. 24 (1965). To allow, by a strict interpretation of Rule 12 (b)(2), the defendant to postpone, and thereby deny the government an opportunity to have a jury pass on them, would detract from the fairness to which the prosecution, as the people's representative, can also lay some measure of claim.

We find the same basic theme we have discussed—the need for adequate record—running through the decisions of this Court succeeding *Watson*. *United States* v. *Har-*

rison, supra, and *United States* v. *Cox*, 139 U.S. App. D.C. 264, 432 F.2d 1326 (1970), were handed down on the day *Watson* was decided. In *Cox* a conviction under 21 U.S.C. § 174 was reversed because of the failure of the trial judge to instruct the jury properly. The Court refused to pass on the *Robinson* issue, stating: "Since that issue has not heretofore been raised, in the District Court, it will be open to appellant to pursue it upon our remand for a new trial. See *Watson* v. *United States*." 139 U.S. App. D.C. at 265, 432 F.2d at 1327. *Harrison*, on the other hand, affirmed a conviction under 26 U.S.C. § 4704 (a) and rejected the appellant's claim based on the same premises as the *Watson* dicta, that as to an addict, as he claimed to be, his mandatory sentence was cruel and unusual punishment. The Court noted that there was indication on the record that he was a trafficker and concluded that, "in any event, our decision *en banc* this day in *Watson* v. *United States* . . . is conclusive that, on the record before us and the course taken by the proceedings in the District Court,[34] appellant is not entitled to relief on this ground." 139 U.S. App. D.C. at 268, 432 F.2d at 1330. These decisions indicate to us that the sense of *Watson* is that the opportunity simply to make a record suitable for a *Watson*-oriented motion to dismiss should not, in general, be afforded those tried in the District Court prior to July 15, 1970, the date of *Watson*. In *Cox* there was a remand on non-*Watson* grounds for a new trial. This, effectively, would be a new proceeding. Hence, like any other case coming to trial after *Watson*, the opportunity to make a record at the appropriate stage of the proceedings would be available to Cox. In *Harrison*, however, there was no defect in the conviction. No further proceedings in the District Court on non-*Watson* grounds were necessary. The refusal of the Court even to consider a remand purely on the basis of *Watson* makes

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[34] Harrison had also been found guilty, in a trial to the court, of a violation of 21 U.S.C. § 174, but the trial judge set that verdict aside before sentencing. *See* 139 U.S. App. D.C. at 267, 268 n.3, 432 F.2d at 1329, 1330 n.3.

clear that the general rule is that pre-*Watson* convictions may not be reopened simply in order to attempt to develop the record which *Watson* requires.

It is in this spirit that we read *Kleinbart* v. *United States, supra.* Kleinbart, convicted before *Watson* was decided, posed to the Court the "somewhat unusual circumstances" of a constitutional claim effectively involving the retroactivity of the *Watson* dicta which was applicable only to him.[35] Rather than making an unnecessary decision, this Court vacated his sentence and remanded to the District Court for a hearing to consider whether he would be eligible for a Title II NARA commitment in light of *Watson.*[36] The Court's opinion concluded:

> If appellant is so eligible, and if such disposition is afforded him, the matter will be at an end, such disposition mooting his claim regarding the mandatory minimum sentence applied to him. If he is not given rehabilitative disposition under the Act, the trial court should grant him leave to argue, under *Watson*, that the statute cannot be applied to him either as a matter of construction or of constitutional law, and to introduce such evidence as he can muster to support his claim. *Kleinbart, supra,* slip op. at 7.

This result, like that reached in *Cox*, is in our view an instance of the exceptional situation where a remand on separate grounds is ordered. Though not predicated on a new trial, as was *Cox*, the remand in *Kleinbart* invited

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[35] Kleinbart had argued in the trial court that, as an addict possessing narcotics only for his own use, the mandatory minimum sentencing provisions could not constitutionally be applied to him. Since *Watson*, which had been handed down after he made this argument in the District Court, had predicted that such a factual predicate might be grounds for taking such a person outside the ambit of the federal narcotics statutes altogether, the Court reasoned that a decision on the constitutionality of the sentencing provisions would affect only Kleinbart. Slip op. at 5-7.

[36] Kleinbart had been sentenced as a second offender for a conviction under 21 U.S.C. § 174 based on a 1958 conviction for violation of the Marijuana Tax Act, 26 U.S.C. § 4744.

further proceedings—resentencing under NARA—on the basis of the special equitable consideration given to the fact that Kleinbart had raised a substantial constitutional issue, which the Court, for reasons of the symmetry of its jurisprudence, had refused to decide. On these special facts, the "interests of justice" permitted an application for resentencing under NARA and at least an opportunity to make a record upon which an argument based on the *Watson* dicta (which Kleinbart long before *Watson* had anticipated in an analogous argument before the District Court) could be made.[37]

In *Watson* the Court concluded its analysis by stating:

> We think that definitive rulings with respect to [arguments based on the Eighth Amendment and the purview of the federal narcotics statutes] cannot meaningfully be made on such a record, *and are more properly to be left to the orderly processes of adversary litigation beginning at the trial court level, and with fact-finding sufficiently close in point of*

[37] To the extent that the language from the *Kleinbart* opinion which is set out in the text, *supra*, can be read to mean that *Watson* applies retroactively across the board, we submit that such an interpretation does not comport with the *Watson* opinion itself. Though the Court in *Watson*, as in *Kleinbart*, remanded for resentencing under NARA (in keeping with the holding of the case), it specifically refused to allow Watson to develop a record at the remand hearing for the purpose of making an argument, based on the dicta in the opinion, that he could not be prosecuted under the federal narcotic laws. *Watson*, slip op. at 23. This indicates quite strongly that the considerations discussed in *Watson* are to be reserved in the main for new cases on proper records, and that the result reached in *Kleinbart* is merely an exception made for the unusual circumstances of that case.

Furthermore, even the actual holding of *Watson* regarding eligibility for sentencing under Title II of NARA has been applied with only limited retroactivity. It appears to be restricted to cases which had not completed the process of direct review when *Watson* was decided. *United States* v. *Williams*, D.C. Cir. No. 23,597, decided December 10, 1970; *United States* v. *Gaines*, —— U.S. App. D.C. ——, 436 F.2d 150 (1970); *United States* v. *Montgomery*, D.C. Cir. No. 23,831, decided September 22, 1970 (unreported order); *Fuller* v. *United States*, 139 U.S. App. D.C. 375, 433 F.2d 533 (1970); *see Kleinbart* v. *United States*, *supra*, slip op. at 7 n.15.

> *time to the events in question as to assure its integrity.* That is the only way we know of whereby judicial, as distinct from legislative, relief, at both the trial and intermediate appellate levels, may be sought by the non-trafficking addicts from the rigors of criminal prosecution under the existing federal narcotics statutes. Slip op. at 23 (emphasis added).

This language, together with the analysis we have presented heretofore, leads us to conclude that the Court's comments in *Watson* can apply only to cases which went to trial after the opinion was handed down.

It is our view, therefore, that *Watson* has no application to appellant's case. Her case, in fact, illustrates the soundness of limiting *Watson* to cases tried after July 15, 1970. As we have noted, *Watson* stresses the need for an adequate factual record. Appellant sought to make her factual showing at the time of sentencing, almost seventeen months after the date of her arrest and four months after trial. She proffered nothing toward establishing, either through medical or lay testimony or through other evidence, that she was addicted to narcotics on March 30, 1969. In fact, the indications in the record are to the effect that she had not used narcotics at all for about ten months before her sentencing in August 1970.[38] With apparently no available medical evidence bearing on the issue, the District Judge would have been left to decide between the testimony of appellant (and perhaps other lay witnesses she might produce) and the testimony of the policeman involved in the case. Surely any determination he might make would *not* be "fact-finding sufficiently close in point of time to the events in question as to assure its integrity." *Watson, supra,* slip op. at 23. Nor would such a hearing, at a date considerably after trial, be part of "the orderly processes of adversary litigation" since both sides would be attempting to relate facts to significant new developments in the law

[38] See S. 3, 7; footnote 30, *supra.* Appellant, as a non-addict when convicted and sentenced, would therefore be ineligible for sentencing under NARA.

which occurred almost sixteen months after facts giving rise to the offense took place. No one, until two months *after* appellant was found guilty, was on notice that it would be significant whether or not she was a non-trafficking addict possessor of narcotics. The need for a proper record, because of the policy and jurisprudential concerns of *Watson*, is the bar to extension of the dicta in that case to her. Furthermore, there were indications, both in the presentence report and in the affidavits drawn up shortly before she was arrested,[39] that appellant was engaged in trafficking (S. 3-8). With her alleged eligibility for *Watson* consideration thus checkmated, it would have been pointless for the trial judge to order a hearing.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN G. GILL, JR.,
ROGER M. ADELMAN,
Assistant United States Attorneys.

[39] See appendices A and B, *infra*, pp. 23-28.

APPENDIX A

Affidavit in support of a United States Commissioner's search warrant for the premises, 1423 Harvard St., N.W., apt. #208, Washington, D.C. Entire premises occupied by a Subject known as Charles Westley Harris and an arrest warrant for the same subject, Charles Westley Harris, described as a Negro, Male,[40] 29 years, 6′, 170 lbs.

Prior to March 17, 1969 Officer James R. Johnson of the Tenth Precinct received information from a source that stated that it had been buying heroin from a man it knew as Charles, described above, out of the premises 1423 Harvard St., N.W., apt. #208, Washington, D.C. This source further stated that it has been buying heroin from Charles out of the aforementioned premises for about 1 week, the last time yesterday, March 16, 1969. This source stated that on occasions it has purchased Heroin from Charles out of the premises, 1423 Harvard St., N.W., apt. #208, Washington, D.C. The Narcotic would be secreted in the bedroom, on the dining room table or on his person, the man known as Charles. This source stated that it would be willing to make a purchase of Heroin from the man it knew as Charles out of the premises, 1423 Harvard St., N.W., apt. #208, Washington, D.C., for the Vice Squad.

On March 17, 1969, the above mentioned source, who has provided members of the Tenth Precinct Vice office with information which has resulted in the arrest of more than 10 violators for violations of the Gambling and liquor laws of the District of Columbia and on more occasions which has resulted in obtaining search warrants for violations of the Gambling and Liquor Laws of the District

[40] The words "described as a Negro Male" are crossed out in the original with the initials "MBT" (Detective Taylor) and "WCP" (Judge Pryor) written in handwriting immediately above and below the line.

of Columbia. The above mentioned Source met with Officer J. R. Johnson and Marcellous B. Taylor in the vicinity of 1423 Harvard St., N.W. She got into the car being driven by Officer Taylor and was searched and found to be free of any money or Narcotic drugs. Officer Taylor gave the source a sum of MPDC advanced funds and the source was driven to the vicinity of 1423 Harvard St., N.W., Washington, by Officer Taylor of the Tenth Precinct Vice Squad. The source then left Officer Taylor's car and was observed by Officer Taylor to walk directly to the premises, 1423 Harvard St., N.W., and to Apt. #208 where it entered. A short time later Officer Taylor observed the source leave the premises and rejoin Officer Taylor. The Source was then driven a short distance from the above mentioned premises where it was searched and 2 capsules [41] was seized which contained a quantity of white powdered substance. The source advised Officer Taylor that when it left the car of Officer Taylor, it walked directly in the premises, 1423 Harvard St., N.W. and into Apt. #208, knocked on same and was admitted into the premises by the man it knew as Charles Harris. The source further advised Officer Taylor that after it had entered the premises it told Charles that it wanted to buy some Heroin and that Charles walked to the bed room, returned shortly with 2 capsules of white powdered substance. The Source then gave Charles the sum of MPDC advanced funds. The source stated that there was about 10 [42] people in the premises all of which it had noticed had needle marks on their arms. She stated that it heard one subject yell, hurrah and come out of the bathroom so I can Take-off. The source advised that when it left the premises of 1423 Harvard St., N.W., apt. #208, Washington, D.C. it walked directly to where Officer Taylor was waiting in his auto.

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[41] The number of capsules is written in by hand, the written figure 2 replacing the typed figure 1. The initials of Detective Taylor, "MBT", are written in next to this amendment.

[42] The number "10" is written in by hand, and the initials "MBT" (Detective Taylor) appear next to it.

Officer Richard A. Bias of the Narcotic squad performed a preliminary field test on a portion of the powder that he received from Officer Taylor and received a positive color reaction indicating the presence of a Narcotic drug of the Heroin group.

Investigations revealed that the apt. 208, 1423 Harvard St. N.W., Washington, D.C. was listed to a Sherrin Williams. It revealed further that a Subject by the name of Clarence Harris Jr., brother of the above mentioned subject also frequented the premises, this subject has been arrested and convicted of numerous narcotic charges.

Because of the information received along with the events of March 17, 1969, the undersigned officer does believe that there is now illicit narcotic drugs being secreted inside the premises 1423 Harvard St. N.W. apt. #208, Washington, D.C. by Charles Westley Harris, described above.

/s/ Marcellous B. Taylor
MARCELLOUS B. TAYLOR
Officer
Tenth Precinct, MPDC

Subscribed to and sworn to before me this 17 day of March, 1969.

/s/ William C. Pryor
Judge, D.C. Court of
General Sessions

APPENDIX B

Affidavit in support of a United States Commissioner's search warrant for the premises, 1423 Harvard St., N.W., Apt. #201, Washington, D.C. Entire premises occupied by a subject known as Clarence Harris, Jr., and an arrest warrant for the same subject, Clarence Harris, Jr., described as a Negro Male, 32 years, 6′ 2″,[43] black frame glasses.

Prior to March 17, 1969, Officer James R. Johnson of the Tenth Precinct received information from a source that stated that it had been buying heroin from a man it knew as Clarence, described above, out of the premises 1423 Harvard St., N.W., Apt. 201, Washington, D.C. This source further stated that it has been buying heroin from Clarence out of the aforementioned premises for about 1 week, the last time yesterday, March 16, 1969. This source stated that on occasions it has purchased heroin from Clarence out of the premises, 1423 Harvard St., N.W. Apt. #201, Washington, D.C. The Narcotic would be secreted in the dining room on the dining room table or on his person, the man known as Clarence. This source stated that it would be willing to make a purchase of heroin from the man it knew as Clarence out of the premises, 1423 Harvard St., N.W., Apt. #201, Washington, D.C. for the Vice Squad.

On March 17, 1969, the above mentioned source, who has provided members of the Tenth Precinct Vice Office with information which has resulted in the arrest of more than 10 violators for violations of the Gambling and Liquor Laws of the District of Columbia and on more occasions which has resulted in obtaining search warrants for violations of the Gambling and Liquor Laws of the District of

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[43] The words "Male, 32 years, 6′2″," are crossed out in the original, with the initials "MBT" (Detective Taylor) and "WCP" (Judge Pryor) written in handwriting immediately above and below the line.

Columbia. The above mentioned Source met with Officer J. R. Johnson and Marcellous B. Taylor in the vicinity of 1423 Harvard St., N.W. She got into the car being driven by Officer Taylor and was searched and found to be free of any money or Narcotic drugs. Officer Taylor gave the source a sum of MPDC advanced funds and the source was driven to the vicinity of 1423 Harvard St., N.W., Washington, by Officer Taylor of the Tenth Precinct Vice Squad. The source then left Officer's Taylor car and was observed by Officer Taylor to walk directly to the premises, 1423 Harvard St., N.W. and to Apt. #201 where it entered. A short time later, Officer Taylor observed the source leave the premises and rejoin Officer Taylor. The source was then driven a short distance from the above mentioned premises where it was searched and 1 capsule was seized which contained a quantity of white powdered substance. The source advised Officer Taylor that when it left the car of Officer Taylor, it walked directly in the premises 1423 Harvard St., N.W., and into Apt. #201, knocked on same and was admitted into the premises by the man it knew as Clarence Harris, Jr. The source further advised Officer Taylor that after it had entered the premises it told Clarence that it wanted to buy some heroin and that Clarence walked into the bedroom, returned shortly with 1 capsule of white powdered substance. The source then gave Clarence the sum of MPDC advance funds. The source stated that there was about 5 people in the premises, all of which he had noticed had needle marks on their arms. She stated that it heard one subject yell, "Hurrah, and come out of the bathroom so I can Take-off." The source advised that when it left the premises of 1423 Harvard St., N.W., Apt. #201, Washington, D.C., it walked directly to where Officer Taylor was waiting in his auto.

Officer Richard A. Bias of the Narcotic Squad performed a preliminary field test on a portion of the powder that he received from Officer Taylor and received a positive color reaction indicating the presence of a Narcotic drug of the heroin group.

Investigations revealed that the Apt. #201, 1423 Harvard St., N.W., Washington, D.C., was listed to a Sherrin Williams. It revealed further that a subject by the name of Clarence Harris, Jr., brother of the above mentioned subject also frequented the premises, this subject has been arrested and convicted of numerous narcotic charges.

Because of the information received along with the events of March 17, 1969, the undersigned officer does believe that there is now illicit narcotic drugs being secreted inside the premises 1423 Harvard St., N.W., Apt. #201, Washington, D.C. by Clarence Harris, Jr., described above.

/s/ Marcellous B. Taylor
MARCELLOUS B. TAYLOR
Officer
Tenth Precinct, MPDC

Subscribed to and sworn to before me this 17 day of March, 1969.

/s/ William C. Pryor
Judge, D.C. Court of
General Sessions

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